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No. 92-1396

In The

Supreme Court of the United States

October Term, 1992

MORRIS INDUSTRIAL BUILDERS, INC., a New Jersey Corporation,

Petitioner,

vs.

THE TOWNSHIP OF SOUTH BRUNSWICK in the County of Middlesex, a municipal corporation of the State of New Jersey, THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF SOUTH BRUNSWICK, THE PLANNING BOARD OF THE TOWNSHIP OF SOUTH BRUNSWICK,

Respondents.

On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION FOR RESPONDENT NEW JERSEY COUNCIL ON AFFORDABLE HOUSING

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QUESTION PRESENTED

Whether *McKesson v. Division of Alcoholic Beverages*, 496 U.S. 18 (1990) applies where fees collected pursuant to a municipal ordinance to be used to satisfy a State constitutional obligation to provide low and moderate income housing are not taxes and the scheme under which the fees were collected is not unconstitutional or otherwise illegal.

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In two landmark decisions, the Supreme Court of New Jersey declared that each municipality in the State has a unique and important obligation under New Jersey's constitution to provide a

realistic opportunity for its fair share of lower income housing. N.J. Const. (1947), Art. I, ¶1; Art. IV, § 6, ¶2; *So. Burl. City, N.A.A.C.P. v. Tp. of Mt. Laurel*, 67 N.J. 151, 174, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975); *So. Burl. Cty. N.A.A.C.P. v. Mt. Laurel Tp.*, 92 N.J. 158, 208-09, 456 A.2d 390 (1983). In response to the so-called *Mt. Laurel* decisions, the State Legislature enacted the Fair Housing Act (the Act), N.J.S.A. 52:27D-301 *et seq.*, to provide a comprehensive mechanism to address in an orderly and meaningful way the constitutional duty of all local communities. *See* N.J.S.A. 52:27D-303.

Among its many regulatory features, the Act created a State agency known as the Council on Affordable Housing (the Council) and gave it wide-ranging administrative powers to define regional needs throughout New Jersey for low and moderate income housing, to establish guidelines for municipalities to determine their fair share of the region's needs and to decide if proposed ordinances and related planning steps will satisfy local needs. *Hills Dev. Co. v. Bernards Tp.*, 103 N.J. 1, 21-23, 510 A.2d 621, 632-33 (1986). Under the Act, a municipality is required to submit to the Council a "housing element," which is an analysis of the measures it plans to take to address its lower income housing obligation, and a "fair share plan," the township's proposed ordinances designed to actually carry out its planning steps. N.J.S.A. 52:27D-309(a); N.J.A.C. 5:91-4.2. Pursuant to the Act, a municipality ". . . may provide for its fair share of low and moderate income housing by means of any technique or combination of techniques which provide a realistic opportunity for the provision of the fair share." N.J.S.A. 52:27D-311(a). Based on its submissions, a community may petition the Council for "substantive certification" which, if granted, constitutes approval of the plan to satisfy the municipality's *Mt. Laurel* obligation. N.J.S.A. 52:27D-313.

In response to the constitutional obligation to provide affordable housing as codified in the Act, several municipalities

adopted ordinances requiring owners of new development to pay to the municipalities a fee which the municipalities would use for lower income housing. The method for imposing the fee varied from municipality to municipality, but, generally, the fee imposed was based on the size of the project. *See Holmdel Builders Ass'n v. Township of Holmdel*, 121 N.J. 550, 558-62, 583 A.2d 277, 281-83 (1990). Several builders associations filed suit against a number of municipalities, including South Brunswick Township, challenging these municipal development fee ordinances, claiming that the ordinances exceeded municipal authority under the zoning and police powers and the Act; were illegal taxes; constituted an uncompensated taking and were a denial of due process and equal protection. In *Holmdel Builders Ass'n v. Township of Holmdel, supra*, the New Jersey Supreme Court rejected these arguments. The Court found that a municipality has the statutory authority under the Act to impose by ordinance mandatory fees on development to be used for affordable housing. The Court also concluded that, since the Act created the Council and vested it with primary jurisdiction over satisfaction of the municipal fair share housing need, the Council, in the first instance, should adopt regulations to govern imposition of development fees. Because the Council had not yet promulgated regulations governing mandatory development fees, the Court ruled that the ordinances at issue were not validly adopted. The New Jersey Supreme Court also specifically declared that development fees did not constitute a tax, but rather were legitimate regulatory measures designed to provide a realistic opportunity for provision of the municipality's lower income housing need.

In response to *Holmdel Builders Assn'n*, on January 28, 1991, the Council issued an Administrative Order directing municipalities that had collected fees prior to *Holmdel Builders Ass'n* to hold those monies in a separate, interest bearing escrow account pending promulgation of regulations. The Order was intended to preserve the *status quo* until the Council could follow the New Jersey Supreme Court's directive and promulgate regulations governing mandatory development fee ordinances.

Meanwhile, a number of developers instituted lawsuits against six municipalities claiming that they were entitled to a refund of the fees paid. In all cases, the developers argued that *Holmdel Builders Ass'n* mandated refunds. The developers relied heavily on language in the opinion that rejected one builders association's attempt to sue for refunds on behalf of its constituents. The New Jersey Supreme Court rejected the claim on standing grounds ". . . without prejudice to the right of individual members to seek refunds in separate actions." *Holmdel Builders Ass'n v. Township of Holmdel, supra*, 121 N.J. at 586, 583 A.2d at 295. The developers also relied on the New Jersey Supreme Court's finding that the ordinances were not validly adopted due to lack of Council regulations. Each municipality sued raised the Council's Administrative Order as a defense to its failure to give refunds and the Council sought and was granted leave to intervene in all cases.

Petitioner, Morris Industrial Builders, Inc., as well as several other developers, filed suit against South Brunswick Township seeking refunds of the development fees they had paid under South Brunswick's mandatory development fee ordinance. All plaintiffs, including Petitioner, moved for summary judgment, arguing that *Holmdel Builders Ass'n* entitled them to refunds of fees paid under the ordinances as a matter of law and that the Council had no authority to adopt regulations that would enable municipalities to keep fees collected under ordinances adopted before promulgation of Council regulations. The Council filed a cross-motion for summary judgment arguing that *Holmdel Builders Ass'n* did not mandate refunds and that the Council could adopt regulations allowing municipalities to retain fees already collected. Neither Petitioner nor the other developers raised any federal due process issues during the course of the hearings before the trial court. Petitioner did state in its complaint that South Brunswick's actions in continuing to hold the development fee collected from Petitioner "violates the plaintiffs' constitutional due process rights and

plaintiffs' property rights," however, petitioner never raised any arguments concerning this allegation in its summary judgment motion or in response to the Council's cross-motion.

In the South Brunswick cases, by Order dated July 30, 1991, the trial court granted the developers' Motions for Summary Judgment finding that *Holmdel Builders Ass'n* required a refund and denied the Council's motion. In ordering refunds, the trial court concluded that the Council could not promulgate regulations that would allow municipalities to keep the previously collected fees. The trial courts in the cases involving other municipalities issued similar rulings.

The Council appealed those cases in which the trial courts' decisions constituted a final judgment and was granted leave to appeal in those cases where the trial courts' Orders were interlocutory. Meanwhile, on January 21, 1992, while the Council's appeals from the refund Orders were pending, the Council adopted regulations governing development fees. N.J.A.C. 5:91-15.1 *et seq.*; 5:92-18.1 *et seq.* These regulations include procedures for retaining previously collected fees. N.J.A.C. 5:91-15.1 *et seq.* Three developers filed timely appeals from these regulations which are now pending before the New Jersey Appellate Division.

The Appellate Division ruled on the Council's appeals from the trial courts' refund Orders in *Frank A. Greek v. South Brunswick Tp.*, 257 N.J. Super. 94, 607 A.2d 1359 (App. Div. 1992), *certif. denied*, 130 N.J. 602, 617 A.2d 1223 (1992). The New Jersey Appellate Division found that *Holmdel Builders Ass'n* did not mandate refunds. Rather, the court found that the Supreme Court did not decide the issue. The Appellate Division then concluded that the Council has the "potential power to promulgate regulations upon which the defendant municipalities may rely to validate prior action on their part in collecting mandatory builders'

fees." *Id.* at 101, 1362. Relying on well-established law, the Appellate Division found that the municipalities can validate ordinances since the municipalities were not acting *ultra vires*. The Appellate Division stressed in its opinion that it was deciding only the limited issue of the Council's potential power to pass curative regulations and the municipalities potential power to validate their prior actions. Since the Council had expressed to the trial courts its intention to adopt regulations, the Appellate Division concluded that the trial courts should have deferred to the Council for a reasonable period pending completion of the rule promulgation process and, accordingly, reversed the Orders requiring refunds.

Petitioner, as well as several other developers, petitioned the New Jersey Supreme Court for discretionary review of *Frank A. Greek*. The parties argued that the New Jersey Supreme Court should hear the cases because the Appellate Division had interpreted the New Jersey Supreme Court's decision in *Holmdel Builders Ass'n* wrongly and because the Appellate Division had misapplied the well-settled law governing validation of prior municipal actions. Petitioner also argued, for the first time in the long history of these cases, that the failure to award refunds violated federal due process standards as set forth in *McKesson v. Division of Alcoholic Beverages*, 496 U.S. 18 (1990). The New Jersey Supreme Court denied the various petitions for certification without comment on November 24, 1992. *Frank A. Greek v. South Brunswick Tp., supra*. Petitioner filed a petition for writ of certiorari with this Court on February 22, 1993. Respondent received the petition on February 23, 1993.

SUMMARY OF ARGUMENT

1. Petitioner failed to raise federal due process arguments at either the trial or Appellate Division levels, despite having ample opportunity to do so and the Appellate Division decision does not discuss any federal due process issues. Petitioner first raised

McKesson and the due process issue when it petitioned the New Jersey Supreme Court for certification. New Jersey appellate courts do not address issues not properly raised at the trial level. *Nieder v. Royal Indemnity Co.*, 62 N.J. 229, 234, 300 A.2d 142, 145 (1973). The United States Supreme Court generally will not review a final judgment of a State court where the claim was not presented in the States courts. *Bd. of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 550 (1987). Petitioner's failure to properly raise these claims, therefore, should preclude its petition.

2. This petition should be denied because the matter is not finally resolved by the New Jersey courts. In *Frank A. Greek v. South Brunswick Tp., supra,* the New Jersey Appellate Division decided only the limited issue of the Council's power to promulgate regulations that may allow municipalities to validate their previously adopted development fee ordinances, thereby allowing the municipalities to retain the fees collected or a portion thereof. As the Appellate Division noted, the substance of the regulations and municipal conduct in response to the regulations is a separate matter. An appeals from the regulations are now pending before the New Jersey Appellate Division. It is these regulations that set forth the procedures that may allow municipalities to retain previously collected fees or, conversely, will result in refunds to the developers. Since Petitioner's requested relief is a refund, it seems premature at this time to consider this case when the very regulations that may result in some refund still are on appeal in the State courts.

3. Contrary to Petitioner's assertions, *McKesson* has no applicability whatsoever to this case. *McKesson* states that due process requires the State to afford taxpayers a meaningful opportunity to secure post-payment relief for taxes already paid pursuant to a tax scheme ultimately found unconstitutional. In this case, there is no tax involved nor is there any payment scheme involved that has been found to be unconstitutional or otherwise

illegal. The New Jersey Supreme Court specifically declared that development fees are not taxes. *Holmdel Builders Ass'n v. Township of Holmdel*, 121 N.J. at 585, 583 A.2d at 294. Moreover, the New Jersey Appellate Division found that the Council possesses the statutory authority to promulgate regulations to allow municipalities to retain previously collected fees and that municipalities may validate the invalidly adopted ordinances pursuant to Council regulations. *Frank A. Greek v. South Brunswick Tp., supra*. These conclusions were reached solely on the basis of State law. Without some scheme of illegal taxation present, *McKesson* provides no basis for granting the petition.

4. Even assuming *arguendo* that *McKesson* is not limited to taxes and applies to any monies collected by a governmental entity, *McKesson* still does not apply to this case. The underlying premise of *McKesson* is that the government must provide a mechanism to refund citizens' monies when those monies have been collected illegally. In this case, no court has found that the municipalities involved have collected fees illegally. The New Jersey courts have found that development fees are authorized under the Act and that the Council may adopt regulations that allow municipalities to retain previously collected fees. Unlike *McKesson*, this is not a situation where the government's collection of monies is unconstitutional or illegal.

REASONS FOR DENYING THE WRIT

There are no special and important reasons why this Court should review the New Jersey Appellate Division's decision in *Frank A. Greek*. Sup. Ct. R. 10. Petitioner did not raise the federal law questions which it now urges this Court to consider at either the State trial or Appellate Division levels. Indeed, the opinion from which Petitioner seeks review does not even discuss any of the issues Petitioner now raises. Petitioner, therefore, should not be permitted now to premise the basis for this court's jurisdiction on

such arguments. Additionally, contrary to Petitioner's assertions, no federal due process issues as discussed in *McKesson* are at issue in this case. *Frank A. Greek v. South Brunswick Tp., supra,* the case from which Petitioner seeks review, is just one case in an ongoing series of cases addressing the permitted use of development fees as a technique to provide for the municipal fair share lower income housing need as required under New Jersey law. This is not a situation where a party has paid an unconstitutional tax and the State is refusing to refund the taxes wrongly collected. Thus, the post-deprivation remedy and attendant due process considerations as discussed in *McKesson* do not apply.

Initially, this Court should deny the petition because Petitioner never properly raised the federal law issues in the State courts and the New Jersey courts therefore have not had the opportunity to review the federal due process issues Petitioner raises. Petitioner did not raise any federal due process claims at either the trial court or Appellate Division level.[1] Petitioner certainly had ample opportunity to do so, especially since it was Petitioner's Motion for Summary Judgment, which the trial court granted, that was the subject of *Frank A. Greek.* Petitioner's arguments both before the trial court and Appellate Division were premised on State law. Consequently, there is no discussion of any federal due process considerations in *Frank A. Greek.* It was not until Petitioner sought discretionary review of *Frank A. Greek* from the New Jersey Supreme Court that it even raised *McKesson* and federal due process arguments. The New Jersey Supreme Court denied the petition without explanation, not surprisingly

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1. Petitioner did allege in its complaint that the failure of South Brunswick to refund its money constituted a deprivation of its due process rights. Petitioner, however, never pressed this claim. The mere mention of a federal right without full briefing and argument is an insufficient basis on which to premise Supreme Court jurisdiction. *Bankers Life & Cas. Co. v. Crenshaw,* 486 U.S. 76, 77-78 (1988).

thereby refusing to address the newly raised federal issues since New Jersey appellate courts will not consider issues which have not been raised in the trial courts. *Nieder v. Royal Indemnity Co., supra,* 62 N.J. at 234, 300 A.2d at 145.

Likewise, this Court will not review a State court decision unless the record demonstrates that the federal claim was adequately presented in the State system. *Bd. of Directors of Rotary Int'l v. Rotary Club,* 481 U.S. 537 (1987). The absolute silence of the Appellate Division's decision aptly demonstrates that federal issues were not raised before it. *Exxon Corp. v. Eagerton,* 462 U.S. 176, 181 n.3 (1983) (failure of highest State court to pass upon federal question leads to assumption that federal issues were not properly presented in State courts). Under these circumstances, this Court should deny the petition.

Moreover, the New Jersey courts have not finally resolved the matter of imposition of development fees and possible refunds. The purpose of Petitioner's petition as set forth therein is to secure a refund of the development fees it has paid to South Brunswick Township. Petitioner may very well secure some refund. The Council has promulgated regulations which set forth standards and procedures for municipal retention of development fees collected under previously adopted ordinances. N.J.A.C. 5:91-15.1 *et seq.* and N.J.A.C. 5:92-18.1 *et seq.* It is entirely likely, indeed probable, under the regulations, that Petitioner will receive some refund. Those regulations, however, are the subject of pending appeals. As a result of these appeals, the amount of a refund that Petitioner may be entitled to is unsettled. Under these circumstances, it is premature for the Court to consider the petition at this time. This is especially so since the Appellate Division in *Frank A. Greek* specifically limited its decision to the narrow issue of whether the Council has the "potential power" to adopt regulations that allow municipalities to validate previously adopted ordinances thereby resulting in the retention of fees collected. *Frank A. Greek v. South Brunswick Tp., supra,* 257 N.J. Super. at 106, 607 A.2d at 1365.

The petition also should be denied because Petitioner does not present any legitimate federal claim. Petitioner's reliance on *McKesson* in support of its claim that it is entitled to a refund is totally misplaced. In *McKesson*, Florida enacted a liquor excise tax scheme to give preference to alcoholic beverages manufactured from certain products grown in the State. McKesson, which had been paying the taxes, challenged the preferential tax treatment. The Florida court invalidated the tax scheme as violative of the Commerce Clause of the United States Constitution and enjoined future enforcement of the scheme, but declined to order refunds or any other form of relief for previously paid taxes. This Court reversed the Florida court finding:

> When a State penalizes taxpayers for failure to remit their taxes in a timely fashion, thus requiring them to pay first before obtaining review of the tax's validity, federal due process principles long recognized by our cases require the State's post-deprivation procedure to provide a "clear and certain" remedy [cite omitted] for the deprivation of tax moneys in an unconstitutional manner. [*McKesson v. Division of Alcoholic Beverages, supra,* 496 U.S. at 51].

McKesson does not state that a refund is the required remedy. Rather, *McKesson* provides that "[t]he State is free to choose which form of relief it will provide, so long as the relief satisfies the minimum federal requirements we have outlined." *Ibid.* *McKesson* requires the State to afford taxpayers a meaningful opportunity to secure post-payment relief for taxes paid pursuant to a tax scheme found to be unconstitutional.

McKesson is readily distinguishable from the present case for two significant reasons. First, here there is no tax involved. The

New Jersey Supreme Court unequivocally has declared that development fees are not taxes. Rather, the fees are the equivalent of mandatory set asides,[2] another technique already approved by the New Jersey Supreme Court for providing lower income housing. *Holmdel Builders Ass'n, supra,* 121 N.J. at 582-85, 583 A.2d at 293-94. *McKesson* specifically involved taxes and the discussion and decision dealt with an unconstitutional tax scheme. *McKesson,* therefore, is inapplicable.

Even assuming, however, that *McKesson* is not limited to taxes and applies to any type of governmentally compelled fee, *McKesson* still is inapplicable because the fees charged here are not unconstitutional. Indeed, quite the contrary exists here. The New Jersey courts have specifically upheld such fees and the Council's ability to promulgate regulations governing previously collected fees. Thus, not only is the fee not unconstitutional, it has not been found to be illegal in any way.

In *Holmdel Builders Ass'n, supra,* the New Jersey Supreme Court ruled that the State Fair Housing Act authorizes municipalities to impose development fees as a technique for municipal provision of its fair share of lower income housing. The Court further found that, since the State Legislature had vested the Council with primary jurisdiction of municipal satisfaction of the fair share need, the Council, in the first instance should promulgate regulations addressing development fees. In *Frank A. Greek, supra,* the Appellate Division addressed the issue of the Council's authority to adopt regulations that may allow municipalities to

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2. "Set aside means the percentage of housing units devoted to low and moderate income households within an inclusionary development." N.J.A.C. 5:92-1.3. A mandatory set aside is when a municiality by zoning ordinance requires a developer to include a certain percentage of low and moderate income units in a development in order to help satisfy the municipality's *Mt. Laurel* housing obligation.

keep previously collected fees, finding that the Council has such authority. The Appellate Division also ruled that, in accordance with well established State law, municipalities can take action to validate prior development fee ordinances since those ordinances were not *ultra vires*, as explained in *Holmdel Builders Ass'n*. The Appellate Division in *Frank A. Greek* was careful to note that it was deciding only the very limited issues of the Council's "potential power" to pass curative regulations and municipalities' potential power to validate prior ordinances. *Frank A. Greek v. South Brunswick Tp., supra*, 257 N.J. at 106, 607 A.2d at 1365. The substance of the regulations themselves, and thus the actual procedures for retaining fees, presently is the subject of pending appeals before the New Jersey Appellate Division.

The *Holmdel Builders Ass'n* and *Frank A. Greek* cases discussed above demonstrate that development fees for affordable housing are legal. They also demonstrate that the Council has the power to promulgate regulations that may allow municipalities to keep some or all of the fees collected. This is a far cry from the situation in *McKesson* where the State court concluded that the tax scheme in Florida was flatly unconstitutional. Here, the fees are legal and the methods for imposing fees and allowing towns to keep monies already collected still is under judicial review. Moreover, unlike *McKesson* where there was no mechanism for a refund of the illegally imposed taxes, here the Council has adopted regulations that may result in refunds in those instances where the municipality has collected too much money under the Council's standards. N.J.A.C. 5:91-15.1. Given these significant differences, *McKesson* has no applicability whatsoever to the present case and thus cannot provide a basis for granting the petition.

Although not specifically stated in its petition, it appears to be Petitioner's position that the development fees in question are illegal because the New Jersey Supreme Court in *Holmdel Builders Ass'n* felt constrained to declare the ordinances "not validly

adopted" because of lack of Council regulations governing the fees. *Holmdel Builders Ass'n v. Township of Holmdel, supra,* 121 N.J. at 580, 585, 583 A.2d at 292, 295. Petitioner seems to assume that because the municipal ordinances under which the fees were collected were "not validly adopted," the fees are totally illegal and therefore it is entitled to a refund under *McKesson.* As the New Jersey Supreme Court found in *Holmdel Builder Ass'n* and as the Appellate Division explained in *Frank A. Greek,* invalidation on procedural grounds is something that can be cured because the municipal power to adopt the ordinances has existed all along. This is not a situation, as in *McKesson,* were a tax was imposed in violation of the law and therefore the authority to collect the monies was entirely lacking. Petitioner's leap of logic in this case is entirely inconsistent with *McKesson* and provides no basis for granting the petition. *Parker v. McLain,* 237 U.S. 469 (1915) (federal question which rests on obviously false assumption is so plainly devoid of merit as to afford no basis for the exercise of jurisdiction).

Petitioner also mentions briefly without explanation that somehow the New Jersey Supreme Court mistakenly applied *Chevron Oil Co. v. Huson,* 404 U.S. 77 (1971). This argument seems to be wrapped up in Petitioner's arguments that *McKesson* should apply here and therefore it appears really to be an extension of its *McKesson* arguments. For the reasons cited above, *McKesson* has no applicability to this case. In any event, neither the New Jersey Supreme Court nor the Appellate Division cited *Chevron Oil Co.* The Appellate Division in *Frank A. Greek,* citing New Jersey law, did state that issues concerning disruption of governmental policies and other equitable considerations are to be considered when determining whether a law is to be applied retroactively. While the Court in *Frank A. Greek* does discuss retroactive application of laws, it was not the law on retroactivity that was the focus of the court's decision. The Appellate Division found that since New Jersey law allows a municipality to cure an

imperfectly taken action which was within the municipality's authority, it is appropriate for an administrative agency such as the Council to exercise its rulemaking authority and allow municipalities to cure municipal action that was not void *ab initio*. This decision does not implicate *Chevron Oil Co.* in any way.

In conclusion, there is absolutely no basis on which to grant the petition in this case. *Frank A. Greek* involves a matter that is unique to New Jersey, namely municipal satisfaction of a State constitutional obligation to provide lower income housing. The New Jersey Supreme Court has found that development fees are authorized under New Jersey statutes as a method to meet this obligation. Petitioner's last minute attempt to inject federal due process issues into these lengthy proceedings is entirely inappropriate. Moreover, its federal due process arguments relying on *McKesson* have no merit. Under these circumstances, this Court should deny the petition.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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